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**THE “STEP-CHILD OF SCHOLARLY INVESTIGATION”<sup>1</sup>:  
PRELIMINARY OBSERVATIONS ABOUT THE ORIGINS OF  
ACADEMIC JEWISH LAW SCHOLARSHIP**

*David Hollander\**

**I. INTRODUCTION**

Why a book-length bibliography? It is a question I was repeatedly asked by friends and family, and even colleagues, unable to understand why I would spend three years reading every law journal article I could find that had anything to do with Jewish law, and why I would write an annotation for each article, adding up to 245 pages of annotations. What could such a project contribute to scholarship, and how would it be helpful? After all, a few quick database searches can yield hundreds of law journal articles about Jewish law. Why do we need a book, a print book no less, that lists and describes them?<sup>2</sup> But what I set out to write was different from a mere bibliography of the type typically appearing at the end of a scholarly paper, article or book. In form, a list of works with annotations for each, would certainly be like those works cited lists. However careful attention to the curation of the material is what I hoped would set the type of bibliography I wrote apart. In addition, I intended to use my judgment as a librarian to choose which works to add to the bibliography, how to describe them, which features to identify each annotation, and how to place each work cited in the most illuminating context of the larger bibliography.

In the preface to my book, I argued that this sort of old-fashioned bibliography provides value to researchers, even in our era of electronic database searching. It merits mentioning that such an old-

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<sup>1</sup> Max May, *Jewish Criminal Law and Legal Procedure*, 31 J. CRIM. L. CRIMINOLOGY 438, 447 (1940) (arguing that Jewish law, long a “step-child of scholarly investigation,” exerted an important influence on Western law, from medieval Europe through Colonial America).

<sup>2</sup> DAVID HOLLANDER, *LEGAL SCHOLARSHIP IN JEWISH LAW* (2017).

fashioned bibliography is certainly not intended to replace database searching. After all, I used databases to identify the articles that I wanted to include in the book. However, there is great value in an annotated bibliography crafted by a human who reads and understands the nuances and subtleties of the source material, and who therefore can identify connections between sources, trends in the scholarship, and gaps in the literature. Identifying and explaining these features across a broad swath of scholarship, from a bibliographic perspective, provides researchers with pathways to then dig into scholarly literature for further study, and this cannot be replicated by a database.

What is a bibliographic perspective, and how is it different from the more standard substantive scholarly perspective? A bibliographic perspective provides, in part, a wider perspective than the standard scholarly perspective, which I will call substantive scholarship. But it is more than merely a “broader-than-typical” perspective. In a way, a bibliographic perspective is the sort of reverse of the substantive scholarly perspective. Typically, a faculty researcher or scholar should be familiar with the general subject of his or her scholarship, say constitutional law, and an expert in the specific area he or she is researching, say establishment clause jurisprudence. A bibliographer’s focus, in contrast, is in reverse. The bibliographer should be an expert in the bibliographic make-up of the broad area of scholarship, and merely familiar with some of the details of more specific areas. The bibliographer should have the time and perspective to recognize broader trends and citation patterns across a body of scholarly literature by asking questions like: who is writing what, in which journal, how often, over what period of time, who is citing whom, who is criticizing whom, how do parts of the scholarship overlap, and how does the scholarly material develop over time? By focusing on these types of questions, the bibliographer is likely to document features of a body of scholarly literature that may be missed by the scholar digging deep into the substantive arguments of one subtopic. The scholar seeks a deep understanding of the content of a topic covered by the scholarly literature, while the bibliographic-scholar seeks to understand the bibliographic make-up of that scholarly literature. The texture, detail, context, and nuance of the bibliographic make-up that the bibliographer can document and analyze are largely undetectable in database searching. The bibliographer then provides this perspective back to the scholar and thereby plays a valuable role

in the scholarly process. Scholarship conducted from this bibliographic perspective is what I call bibliographic scholarship.

This type of bibliographic scholarship is different from substantive scholarship in other ways as well. Substantive scholarship starts with the topic and uses substantive arguments from other sources in a variety of ways to make an argument about that substantive topic, and, in turn, to create a new source on that topic that joins the panoply of sources for the next scholar to explore. Bibliographic scholarship takes a step back from this substantive scholarly conversation in favor of a larger context. It starts with the sources that already exist, but instead of using the substantive arguments in those sources, bibliographic scholarship looks to the larger structure of those sources. Instead of zeroing in upon what another source argues in a close look, it zooms out to the 30,000-foot level to get a sense of how (or whether) an “ecosystem” or “tapestry” of sources fits together. Taking this view provides two different types of information. First, it can tell us something about the substantive arguments, but from a different vantage than traditional substantive scholarship, which then can be used by the traditional scholars to re-zoom in on arguments. It can also tell us about the scholars and the scholarship from a quasi-sociological standpoint, a sort of meta-analysis of how the sources fit together.

The goal of this essay is to provide a pilot study of how this re-zooming takes place. I intend to unspool one thread (of many) running through this “tapestry” of legal scholarship in Jewish law identified in my bibliography, and preliminarily, to analyze it.

Part II of this essay recounts my findings from the bibliography *Legal Scholarship in Jewish Law* and describes several examples of early law scholarship that are defensive about Jewish law. Part III of this essay provides a deeper look at these law review articles, and complicates my initial impression about them, questioning the necessity of the defensiveness found in the early Jewish law scholarly literature. Finally, Part IV of this essay provides a brief example of how bibliography and bibliographic scholarship can provide the foundation for substantive scholarship by exploring potential parallels between early and contemporary treatments of Jewish law in the academic law literature.

## II. PART II

When I was writing *Legal Scholarship in Jewish Law*, I noticed something intriguing about many of the early law review articles, written from the late nineteenth century through about 1940. The writers of these articles often seem to be responding, rather defensively, to something about the existing views of Jewish law in legal academia. That “something” to which the authors were responding is not always clearly defined, but generally, the authors take issue with a perception of Jewish law as, undeveloped, harsh, rigid, or unworthy of serious study. In some cases, the authors take issue with a treatment of Jewish law that is limited to the Bible, ignoring the vast body of Talmudic law. Some authors seem uninterested in exploring why these misperceptions exist, and others posit varying reasons for the misperceptions, such as general ignorance or misunderstanding, or even anti-Jewish animus. The clear trend that emerges from these early articles is that writers about Jewish law agreed that something about the existing scholarly literature was amiss and needed to be answered. The list below will briefly describe several examples of these defensive articles that I discovered while I wrote the bibliography. Following that, Part III will offer an introduction to how a close analysis of this defensiveness trend might begin.

*The Growth of Jewish Law*, 1 LAW MAG. & REV. 569 (1872). This article summarizes the growth of Jewish law from the Torah into the *Mishna* and *Gemara* in order to counter the view that Jewish law does not warrant study because it is static and never developed beyond Biblical text.

Theodore Spector, *Some Fundamental Concepts of Hebrew Criminal Jurisprudence*, 15 J. CRIM. L. & CRIMINOLOGY 317 (1924). Spector opens this article with a defense of Jewish law generally, and then spends the main part of this article explicitly countering stigmatization of Talmudic criminal law as cruel.

F.G. McKean, *Some Humane Features of Pentateuchal Law*, 35 DICK. L. REV. 13 (1930). Hinting at his defensiveness in the article’s title, McKean argues against what he describes as a common understanding of Biblical law as cruel and harsh.

Bertram B. Benas, *A Plea for an English History of Jewish Law*, 44 JURID. REV. 39 (1932). In this article, the author laments that there is little existing English-language scholarship on Jewish law.

Paul L. Ross, *Lawyers and Judges in Hebrew Jurisprudence*, 67 U.S. L. REV. 19 (1933). Before digging into the specific topic of this article, lawyers and judges, the author criticizes the existing scholarship for its ignorance of the Jewish oral tradition (the *Mishna*) and the large body of Talmudic law.

Jehudah Braver, *Criminal Law According to the Hebrew Code*, 2 KAN. CITY L. REV. 104 (1934). This article aims to explain the Jewish criminal code, and more importantly, argue that it is a humane and just code, both by comparing Jewish criminal law to other legal systems, and by exploring Jewish law's own procedural hurdles to some of its seemingly harsh rules.

G.J.W., *Response to Recognition of Polygamous Marriages in Mosaic Law*, 49 LAW Q. REV. 19 (1933). This short article is a response to an earlier article written by a leading comparative law scholar, W.E. Beckett. The author of this response claims that Beckett's article's description of Jewish law contains major inaccuracies.

Max May, *Jewish Criminal Law and Legal Procedure*, 31 J. CRIM. L. CRIMINOLOGY 8 (1940). This article aims to describe Jewish criminal law and procedure, but because Jewish law has been the "step-child of scholarly investigation," May feels it necessary to state that Jewish law should be seen to have intrinsic value as a highly developed and just legal system.

The defensiveness present in so many of the early articles indicates something. The consistency illustrates, at least, the perception among authors of articles about Jewish law that something in the existing scholarship was amiss. Discovering such features across a body of scholarly literature is exactly the type of new information that bibliographic scholarship can yield, and the bibliographer's role is to find and describe such features. In the following section of this essay, I will describe this feature of Jewish legal scholarship in some greater detail.

**III. PART III**

In this section of this essay, I dig a little deeper into several of the articles listed above. Here I am still engaging in bibliographic scholarship but taking a closer look that begins the process of zooming into scholarly literature in a substantive way. By looking at these articles closer, what more might we learn about why these articles seem to start on such a defensive posture? I will first look at one of the earliest examples of an article that raises the issue of the treatment of Jewish law by legal scholars. Then I will examine two later articles that put this issue at the center of their arguments. Finally, I will look at several articles that take up the specific accusation that Jewish law is cruel and harsh.

One of the earliest dated articles I found provides evidence of several trends seen in the later ones. In an 1872 article, an anonymous writer laments the neglect of the study of Jewish law in the then-new field of historical jurisprudence. The author laments the common view that Torah law underwent no growth or development that would make it worthy of study. One major theme, seen here and throughout later articles, is the argument against the neglect of post-Biblical Jewish law, mainly in the Talmud.<sup>3</sup> Second, the author asserts a clear reason for this neglect. It is not mere ignorance, but rather anti-Jewish prejudice. “[T]he neglect of [study of the law of the Torah and Talmud] is due only to the prejudice, which claims for the law of the Pentateuch that stereotyped and unchangeable character which can suppose no growth or development.”<sup>4</sup> Embedded in this quote is a hint at yet another theme in addition to a critique of scholars’ neglect of Talmudic material: the understanding that Jewish law is rigid, simple, and unchanging. Two of these themes, neglect of the Talmud and the view that Jewish law is rigid, are described repeatedly in other early law journal articles. However, the accusation of anti-Jewish prejudice is rarely so explicitly voiced as it is here. But what is clear is that this 1872 article is speaking out against several perceptions about the prevailing treatment of Jewish law, and its critique is echoed for the following decades.

This echo can be heard in the work of Bertram Benas, writing almost sixty years later. And Benas names names. To illustrate his

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<sup>3</sup> *The Growth of Jewish Law*, 1 LAW MAG. & REV. 569, 570-71 (1872).

<sup>4</sup> *Id.* at 577.

claim that post-Biblical Jewish law is “largely unknown”<sup>5</sup> in the West, he cites an extraordinary statement from William Markby, a leading late nineteenth century British legal scholar: “[T]he Jews never seem to have arrived at any very clear notions about law, at least not about their own law.”<sup>6</sup> Markby was a lawyer and judge, who spent much of his professional life in India serving on the high court of Bengal, where he was known to be a liberal who sympathized with the Indian independence movement.<sup>7</sup> After his appointment in India, he returned to England where he was appointed to teach Indian law at Oxford.<sup>8</sup> These details of Markby’s life illustrate that his ignorance of Jewish law cannot be solely blamed upon a general Western chauvinism given that he was an expert on Indian law with long exposure to both the legal and general worlds beyond England. And yet, in his writing, he appears to have no knowledge of the existence of Jewish law. Benas points to no evidence of a personal animus toward Jews in Markby’s writings, but, like the anonymous author from 1872, he suggests a general anti-Jewish attitude among legal scholars: “When the reign of law in the world is to be extolled, then it is the gift of the Romans; but when its galling yoke is to be condemned, then it is the typical possession of Jewry, the burden of which Jewry has handed down to a law-ridden and law-laden world.”<sup>9</sup> In sum, Benas cites Markby to voice his strong perception that Jewish law is neglected by legal scholars due to prejudice, and Markby’s prejudice from the 1870s remained true, according to Benas, in the 1930s.

However, a closer look at Benas brings that critique into question. In the course of making his case, Benas spends a remarkable amount of time discussing the exceptions, citing scholars who give Jewish law its due credit as an important legal system. For example, Benas cites Frederick Pollack and Frederic William Maitland<sup>10</sup> and, of

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<sup>5</sup> Bertram B. Benas, *A Plea for an English History of Jewish Law*, 44 JURID. REV. 39, 41 (1932).

<sup>6</sup> William Markby, *ELEMENTS OF LAW* (London, Oxford, 3d ed. 1885).

<sup>7</sup> T.G. Watkin, *Sir William Markby*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew and Brian Harrison, ed., 2004).

<sup>8</sup> *Id.*

<sup>9</sup> Benas, *supra* note 5, at 41.

<sup>10</sup> *Id.* at 46; see FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 123 (Bos., Little, Brown & Co. 1895) (“We may guess that if the Jews had not been expelled from England the clumsy mortgage by way of conditional conveyance would have given way to a simpler method of securing debts, and would not still be incumbering our modern law.”). Benas notes that this reference to Jews is related to the unique Anglo-Jewish history related to finance rather than to Jewish law itself.



course, John Selden.<sup>11</sup> He also quotes, at length, Guy Carleton Lee's *Historical Jurisprudence* as an example of a scholar providing a fair reading of Jewish law, and its role in the history of jurisprudence.<sup>12</sup> Given these numerous exceptions, it is fair to ask whether an anti-Jewish bias was as pervasive as Benas might claim.

The citation to Lee is illustrative on this front. First, Benas praises Lee for devoting an entire twenty-seven page chapter of his history of law to the "Law of Israel."<sup>13</sup> However, Benas expresses some mild disappointment that of those twenty-seven pages, the first twenty-five and a half deal only with Biblical law, ignoring completely Talmudic and rabbinic literature.<sup>14</sup> Nevertheless, Benas is thrilled with the short, one and a half page section at the end of the chapter on what Lee terms "Later Hebrew Law."<sup>15</sup> Benas explains that this short section "astonishes the Jewish reader...with the sense of freshness that an oasis in a desert presents to the searching traveler."<sup>16</sup> Benas then continues to quote almost the entire page and a half from Lee.<sup>17</sup>

In sum, Benas makes the case that an English language history of Jewish law is necessary in order for Jewish law to overcome its neglect by legal scholars and to take its rightful influential place in academic jurisprudence. However, Benas cites to numerous sources that do not neglect Jewish law, and these might be cobbled together to conclude that perhaps Jewish law is not as neglected as he might think. Still, by citing to the inaccurate, even ignorant, claims of Markby, it is clear that at least some legal scholars had, at best, a blind spot when looking at Jewish law. And given the number of late nineteenth and early twentieth century legal scholars that at least perceive a measure of bias against or ignorance of Jewish law, it is not possible to conclude that Benas is completely wrong.

Another example of a scholar with a blind spot about Jewish law comes in an anonymous response to a 1932 article by a renowned

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Nevertheless, Benas argues that this reference to Jewry qualifies as a "brilliant flash[]" to be lauded. See Benas, *supra* note 5, at 46.

<sup>11</sup> See Benas, *supra* note 5, at 47.

<sup>12</sup> Guy Carleton Lee, *HISTORICAL JURISPRUDENCE* (1900).

<sup>13</sup> Benas, *supra* note 5, at 43.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 43-44.

<sup>17</sup> *Id.* at 44-45.

legal scholar, W.E. Beckett.<sup>18</sup> Beckett wrote frequently in law journals on comparative law and related subjects,<sup>19</sup> and indeed this very article was cited, somewhat ironically given its treatment of Jewish law, by Israel's Supreme Court.<sup>20</sup> In this article, Beckett makes sweeping, but wildly incomplete, statements about polygamy and Jewish law. He states:

Though Jews do not practise polygamy in England or any European country, Mosaic law permits it. In Near Eastern countries or in countries like Morocco where Jews are governed in personal status matters entirely by Jewish law, Jewish husbands would certainly have the right under the local law to take more than one wife and both marriages would be good marriages. . . . On the other hand, Jews domiciled in England or other European countries have no doubt lost by the law of their domicile the right actually to possess more than one wife.<sup>21</sup>

Here, Beckett is making a correct conclusion, but for an incorrect reason, and reveals an ignorance about Jewish law that calls into question his ability to speak at all about the topic. European Jews, indeed, did not practice polygamy. However, as a close contemporary reader of Beckett's article points out in a retort published in the same journal the following year, the reason was unrelated to modern comparative law, Beckett's specialty.<sup>22</sup> To make this case, the unidentified author first points out that Beckett conflates "Mosaic" law, which usually refers to Biblical law, and "Jewish" law, which

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<sup>18</sup> W.E. Beckett, *The Recognition of Polygamous Marriages Under English Law*, 48 L.Q. REV. 341 (1932).

<sup>19</sup> See, e.g., W.E. Beckett, *Consular Immunities*, 21 BRIT. Y.B. INT'L L. 34 (1944); W.E. Beckett, *International Law in England*, 55 L.Q. REV. 257 (1939); W.E. Beckett, *The Question of Classification (Qualification) in Private International Law*, 15 BRIT. Y.B. INT'L L. 46 (1934); W.E. Beckett, *Diplomatic Claims in Respect of Injuries to Companies*, 17 TRANSACTIONS GROTIUS SOC'Y 175 (1931); W.E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners*, 6 BRIT. Y.B. INT'L L. 44 (1925); W.E. Beckett, *What is Private International Law*, 7 BRIT. Y.B. INT'L L. 73 (1926); W.E. Beckett, *Right to Trade and the Right to Sue*, 39 L.Q. REV. 89 (1923).

<sup>20</sup> See C.A. 191/51 Skornik v. Skornik 8(1) P.D. 141 (1954), reprinted in 2 Selected Judgments of the Supreme Court of Israel 327, 357 (1963) (citing W.E. Beckett, *supra* note 18, for the principle that the law of a person's domicile is used to determine the validity of that person's marriage).

<sup>21</sup> Beckett, *supra* note 18, at 359-60.

<sup>22</sup> G.J.W., *Notes [Response to Recognition of Polygamous Marriages in Mosaic Law]*, 49 L.Q. REV. 19 (1933).

refers to the whole body of Jewish law, within which the post-Biblical laws of the Talmud and other rabbinical writings are essential. Beckett employs those terms interchangeably in consecutive sentences in the quote provided above.<sup>23</sup> The anonymous author explains that while Mosaic law is the foundation of Jewish law, “in the course of one thousand years and more a great superstructure has been erected” upon that foundation.<sup>24</sup> Jewish law is that superstructure. And while Mosaic law permits polygamy, for European Jews, Jewish law does not. As the great superstructure of Jewish law developed, monogamy became more and more the Jewish norm, beginning as early as the sixth century B.C.E., and by the Talmudic era, polygamy was the exception.<sup>25</sup> These trends were accelerated by enactment over the centuries of Jewish laws that imposed requirements upon husbands that would make maintenance of multiple wives difficult.<sup>26</sup> Finally, in 1025 C.E., Rabbi Gershom ben Judah imposed an absolute ban on polygamy that was adopted universally in European Jewish communities.<sup>27</sup> Beckett’s critic concludes that “it is not by the law of their domicil that Jews domiciled in the countries of Europe have lost ‘the right actually to possess more than one wife.’ For by Jewish law, apart from the law of the domicil, they have no such right.”<sup>28</sup> What underlies this exchange between Beckett and his anonymous critic? Beckett, a leading scholar of international and comparative law,<sup>29</sup> appears to lack basic knowledge of Jewish law, and indeed even appears to be ignorant of the existence of post-Biblical Jewish law. Despite this, he advances sweeping characterizations of Jewish law. However, his mistakes do not pass unnoticed, and in twenty-first-century lingo, he is “called out” swiftly in the very journal where he makes his initial mistakes. We can learn from this that ignorance of Jewish law among law scholars, even if pervasive, was quickly answered. This attests to the contemporaneous presence of non-ignorant scholars of Jewish law, and this complicates the observation that ignorance of Jewish law was

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<sup>23</sup> *Id.* at 19.

<sup>24</sup> *Id.* at 19-20.

<sup>25</sup> *Id.* at 20.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (quoting Beckett, *supra* note 18 at 360).

<sup>29</sup> See *supra* note 19. In addition, in the 1940s Beckett served as a legal advisor to the Foreign Office of the British government about the relationship between British law and the League of Nations. See Geoffrey Marston, *The Origin of the Personality of International Organisations in United Kingdom Law*, 40 INTL. & COMP. L.Q. 403, 406-09 (1991).

uniform, or even pervasive, in the legal academy in the early twentieth century.

That said, many articles of this period go beyond the critique that too many scholars are ignorant of Jewish law. Rather, they specifically charge that scholars characterize Jewish law, inaccurately, as cruel and harsh, especially on the subject of criminal law. Writing in 1930, F.G. McKean argues against the “prevalent...conventional impression” that “designate[s] Jewish law as a harsh and cruel system.”<sup>30</sup> Such a view, he explains, ignores principles and precepts that exhibit a humanity often missing in American law, both historically up until 1930, when McKean is writing.<sup>31</sup> Examples offered are the prohibition of cruelty to animals, the prohibition of torture, the prohibition of life-long slavery, and the existence of protections for debtors, among others.<sup>32</sup> As per the title of his article, McKean only addresses Biblical law, leaving the vast corpus of rabbinical law out of his analysis. Because of this, McKean excludes some of the ripest arguments against the harshness of Jewish law. For example, he defends the Biblical law of “eye for an eye,” by arguing that the principle underlying the seemingly harsh rule is not truly harsh, namely the principle that a wrong-doer should be punished proportionately to his or her crime.<sup>33</sup> While this is a strong point, an even stronger rebuttal to accusations of a harsh Jewish law is found in post-Biblical law, whereby the rabbis of the *Mishna* take for granted that “eye for an eye” should not be taken literally, but as a stand-in for proportionate monetary compensation for injury.<sup>34</sup> Jehudah Braver makes exactly this point.<sup>35</sup> He explains that as far back as during the time of Roman rule of Israel, the rabbis presumed that “eye for an eye” should not be understood literally, while at the same time this harsh punishment was “rigorously enforced by the Romans.”<sup>36</sup> Braver also

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<sup>30</sup> F.G. McKean, *Some Humane Features of Pentateuchal Law*, 35 DICK. L. REV. 13, 13 (1930).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 14.

<sup>34</sup> Babylonian Talmud, Tractate Baba Kamma 83b and 84a.

<sup>35</sup> Jehudah Braver, *Criminal Law According to the Hebrew Code*, 2 Kan. City L. Rev. 104, 105 (1934).

<sup>36</sup> *Id.* (citing EDWARD GIBBONS, THE DECLINE AND FALL OF THE ROMAN EMPIRE, CHAP. XLIV). See also EDWARD GIBBONS, THE DECLINE AND FALL OF THE ROMAN EMPIRE, CHAP. XLIV, 381 (Electric Book Company, 2000) (“They [Roman statutes] approve the inhuman and unequal principle of retaliation; and the forfeit of an eye for an eye, a tooth for a tooth, a

counters the notion that Jewish criminal law was unduly harsh by noting that English criminal law imposed the death penalty for over 160 crimes until the early nineteenth century,<sup>37</sup> millennia after Jewish law limited the death penalty to only a few crimes, required exacting evidentiary standards, and rarely, if ever, imposed it.<sup>38</sup> And finally, writing in 1940, Max May also makes an additional the case for the humanity of Jewish law, specifically Jewish criminal law. He argues that even though pre-Talmudic Biblical law may seem “unduly harsh or even barbaric,” it also provides countervailing humane principles that soften the admittedly harsh laws, such as equality before the law and a system of legal procedure intended to ensure fairness.<sup>39</sup> To summarize, many early scholars of Jewish law in the legal academy appear to be answering what they perceive to be an inaccurate understanding of Jewish criminal as harsh and cruel.

In this section of this essay, I took a closer look at several of the articles I noted in *Legal Scholarship in Jewish Law* as having a defensive posture on Jewish law. This closer look reveals several trends. First, it is true that some highly respected scholars appeared to be ignorant of Jewish law, for example Markby and Beckett. Second, many scholars writing about Jewish law perceived a general ignorance of Jewish law, especially of post-Biblical law, and that some sort of bias against Judaism is related to this ignorance. Third, there are many examples of fair and reasonable treatments of Jewish law written during the late nineteenth and early twentieth centuries<sup>40</sup> This third point complicates the first two, calling into question the pervasiveness of the perceived ignorance. Perhaps this deeper look at the examples reveals that the inaccurate portrayals of Jewish law are not as pervasive as it initially appeared, or at least that these portrayals were not fully representative of Jewish legal scholarship of that era. Perhaps the concerns of the early Jewish law scholars were not warranted.

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limb for a limb, is rigorously exacted, unless the offender can redeem his pardon by a fine of three hundred pounds of copper.”).

<sup>37</sup> *Id.* at 105.

<sup>38</sup> See Babylonian Talmud, Tractate Makkot 7a-8b.

<sup>39</sup> Max May, *Jewish Criminal Law and Legal Procedure*, 31 J. CRIM. L. CRIMINOLOGY 438, 439 (1940).

<sup>40</sup> See generally *supra* notes 10, 11, and 12. See also Bertram B. Benas, *Renascence of Jewish Law*, 2 J. COMP. LEGIS. AND INT’L L. 21- 28 (1920); J. Herbstein, *Jewish Law*, 42 S. AFR. L. 4-13 (1925); Isaac Herzog, *Moral Rights and Duties in Jewish Law*, 41 JURID. REV. 60 (1929); Isaac Herzog, *Legacies to Creditors and Satisfaction of Debt in Jewish Law*, 6 TEMP. L.Q. 87 (1931).

**IV. PART IV**

In the previous section of this essay, I engaged in bibliographic scholarship. To review, as a bibliographer I found, compiled and described a scholarly literature. In this process I noted that many late-nineteenth and early twentieth century articles addressing Jewish law exhibited a defensiveness about the existing scholarship, characterizing it as ignorant. Upon digging deeper, it is clear that the literature is a bit more complex than some of these descriptions. While there are some egregious examples of scholarship that is ignorant of Jewish law, there are many counter-examples. In this section of this essay, I begin to move cautiously from bibliographic scholarship into substantive scholarship, mainly for the purpose of illustrating how the bibliographer's work can be handed off to the substantive scholar for further and deeper study. This section is intended to be a first pass at such an effort, illustrative of the potential for further study after a bibliographic scholar finishes his or her work, and the substantive scholar takes over.

By the late twentieth century, law review articles addressing Jewish laws had become a "small but significant body of scholarship."<sup>41</sup> Responding to this development, Suzanne Last Stone argues that much of this scholarship misunderstands the nature of the Jewish legal system, and therefore, applies Jewish law to the American legal system in ways that simply do not make much sense.<sup>42</sup> How might this contemporary critique of legal scholarship in Jewish law relate to the early twentieth century critiques of Jewish law scholarship analyzed in Part III? Might the concerns of a hundred years ago about Jewish law scholarship relate to concerns about that scholarship today? Are there any parallels or contrasts between these two examples of critical scholarship?

As discussed previously, early twentieth century scholars critique portrayals of Jewish law as inaccurate, and accuse these portrayals of ignoring the bulk of the Jewish legal corpus in the Talmud.<sup>43</sup> According to these critiques, these inaccurate portrayals are also often unduly critical of the Jewish legal system as unchanging, or

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<sup>41</sup> See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary Jewish Legal Theory*, 106 HARV. L. REV. 813, 818 (1993).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Benas, *supra* note 5; G.J.W. *supra* note 5.

overly harsh.<sup>44</sup> Moreover, many of the scholars suspect that these portrayals of Jewish law are motivated by an anti-Judaism animus.<sup>45</sup> Stone, writing about one hundred years later, is also critiquing inaccurate portrayals of Jewish law, but instead of finding the portrayals of Jewish law as overly critical or motivated by bigotry, Stone indicates that the inaccuracies are motivated by the opposite, a sort of philosemitism. According to Stone, within this “new genre of Jewish-American legal scholarship,” each scholar has his or her own conception of the nature of Jewish law. Some conceive it as anti-hierarchical, and some as egalitarian. Others conceive Jewish law as communitarian, analogous to feminist jurisprudence, or obligation-based, etc. Each writer offers his or her conception as an example with which to contrast, or model the American legal system.<sup>46</sup> In other words, Jewish law is viewed as ripe for inspiration for whatever a scholar happens to be advocating. However, Stone contends that this tendency results in inaccurate portrayals of Jewish law by failing to account for the true religious nature of the Jewish legal system. These scholars are engaging in “wishful thinking” about Jewish law.<sup>47</sup> Because these scholars misunderstand or even disregard the religious nature of the Jewish legal system, their use of “the history, philosophy, or interpretive techniques of Jewish law to reconstruct American legal theory”<sup>48</sup> leads to inaccurate conclusions. So like the early twentieth century Jewish law scholars, Stone argues that the existing scholarship fails to describe Jewish law accurately. But while the early twentieth century scholars are most concerned about portrayals that are overly rigid, harsh and motivated by anti-Jewish feelings, Stone worries about portrayals of Jewish law that are too elastic, and motivated by misplaced philosemitism that fails to see Jewish law clearly.

Interestingly, in addition to echoing the early twentieth century critics of Jewish law scholarship, Stone also echoes one of the counterexamples of accurate Jewish law scholarship cited by one of the critics, Bertram Benas: Guy Carlton Lee’s *Historical Jurisprudence*.<sup>49</sup> In Benas’s early twentieth century plea for better and more accurate legal scholarship on Jewish law, Lee is featured as a rare

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<sup>44</sup> See, e.g., McKean, *supra* note 30.

<sup>45</sup> See, e.g., The Growth of Jewish Law, *supra* note 3.

<sup>46</sup> See Stone, *supra* note 41, at 818-19.

<sup>47</sup> *Id.* at 814, 818-19, 893-94.

<sup>48</sup> *Id.* at 818.

<sup>49</sup> See Benas, *supra* note 5.

exception to the neglect or mistreatment of Jewish law.<sup>50</sup> And indeed, his fulsome understanding and description of the Jewish legal system appear to stand the test of time, and eerily predicting Stone's critique of the legal academy's use of Jewish law a century later.

In *Historical Jurisprudence*, Lee offers a summary of the history of Jewish law; the chapter addressing Jewish law ends with a brief description of the often neglected corpus of Talmudic, or rabbinic, law, which he terms "later Hebrew Law."<sup>51</sup> A close look at Lee's description of "later Hebrew law" astounds in its echoing of late twentieth century debates about the place of Jewish legal scholarship in the legal academy in ways that neither Benas could have imagined in 1932, nor Lee in 1900. To start, rabbinic Jewish law is cogently and elegantly defined by Lee:

[i]n the last centuries of the Hebrew national life and those immediately following the overthrow of the Jewish State, the Hebrew law, as it is contained in the Pentateuch, became the subject of an elaborate comment, which has been preserved in the Talmud. This great collection of legal treatises and expositions of the law covers the whole of the Pentateuch, and has obtained in the Jewish legal system much the same authority as did the Roman law in the glosses in the law schools of Bologna. The text upon which the comment was written and the treatises found has been quite superseded by the gloss.<sup>52</sup>

This definition is quite sophisticated, and elegantly written, even if one might quibble with Lee's failure to distinguish between the *Mishna* and the *Gemara*. However, what is most interesting about Lee's chapter on Jewish law is his analysis of the relation of Jewish law to Jewish sovereignty and the Jewish religion. He focuses his analysis of the Jewish legal system and its relationship to the "Hebrew religion."<sup>53</sup> He explains that "religious fervor gave [the Jewish legal system] a longer hold on life than might have been the case had it depended merely upon its juristic excellencies."<sup>54</sup> The Jewish legal system's connection to religion became even more important after the

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<sup>50</sup> *Id.* at 43-44.

<sup>51</sup> Lee, *supra* note 12, at 120.

<sup>52</sup> *Id.* at 120-21.

<sup>53</sup> *Id.* at 121.

<sup>54</sup> *Id.*



destruction of the Second Temple in Jerusalem, and the loss of Jewish sovereignty. Even though “Jewish law was deprived of much of its authority...its religious element was brought into greater prominence,”<sup>55</sup> explains Lee. After its loss of authority, the study of Jewish law became even more important to the Jewish religion.<sup>56</sup> Indeed, argues Lee, it is the intimate connection between religion and law that is at the root of the survival of both Judaism and its legal system.<sup>57</sup> This description of an intertwined religion and legal system more than faintly echoes the arguments of the contemporary legal scholar Suzanne Last Stone, writing almost one hundred years after Lee.<sup>58</sup> And like Stone, Lee clearly describes the inseparable relationship between Jewish law and the Jewish religion as a key feature of the legal system itself. Moreover, Lee traces influence of Jewish law to “Christian legislation,”<sup>59</sup> not secular American law, as those criticized by Stone do.<sup>60</sup>

It is essential to note that Stone’s critique of legal scholarship in Jewish law has not gone unanswered. Samuel J. Levine, one of the most prolific scholars of Jewish law in the legal academy, addresses Stone’s challenge head-on in a 1997 article.<sup>61</sup> Levine states that while he is “mindful of Stone’s observations,” he seeks to “provide a framework through which to consider the Jewish legal system on its own terms, before applying it to American legal theory.”<sup>62</sup> While he does concede Stone’s point about the “fundamental differences” between Jewish law (a religious legal system) and American law (a secular legal system), Levine contends that, despite Stone’s warning, “certain conceptual similarities between American law and Jewish law allow for meaningful yet cautious comparison of the two systems.”<sup>63</sup> Levine then offers a lengthy explanation of the Jewish legal system “on its own terms,” focusing on how Jewish law is interpreted from within the Jewish legal system. In an important 2010 article, Levine expands upon this effort, offering a “methodological assessment” of

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See Stone, *supra* note 41.

<sup>59</sup> Lee, *supra* note 12, at 122.

<sup>60</sup> See Stone, *supra* note 41, at 814, 818-19, 893-94.

<sup>61</sup> Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparison and Contrasts*, 24 HASTINGS CONST. L. Q. 441 (1997).

<sup>62</sup> See *id.* at 444.

<sup>63</sup> See *id.*

the development of Jewish legal scholarship in the legal academy generally, and proposing as a model for future scholarship of this type, an “effective methodology for applying a given principle from Jewish legal theory to American law and public policy.”<sup>64</sup> Levine’s three-pronged model requires analysis that:

(1) carefully and accurately depicts the principle [of Jewish law], as understood within Jewish legal theory, in a way that is faithful to the Jewish legal system; (2) considers carefully the extent to which the principle incorporates theological underpinnings that are particular to the Jewish legal model, and accordingly, may not be suitable in the context of the American legal model; and (3) applies the lessons from the Jewish legal system only to the extent that they make sense within the internal logic of the American legal system,

thus remaining faithful to Jewish law.<sup>65</sup> And in the ensuing years, this scholarship has blossomed. Building upon Levine’s model, legal scholarship in Jewish law remains, as Stone described it, small, but even more significant.<sup>66</sup>

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<sup>64</sup> Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 933, 934, 937 (2010).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on “Eye for Eye” and the Death Penalty*, 1998 UTAH L. REV. 505 (1998); Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999); Alan M. Sokobin, *Child Abuse: A Study in Comparative American and Jewish Law*, 31 U. TOL. L. REV. 401 (2000); Note, *Looking to Statutory Intertext: Toward the use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation*, 115 HARV. L. REV. 1456 (2002); Steven H. Resnicoff, *Jewish Law: Duties of the Intellect*, 1 U. ST. THOMAS L.J. 386 (2003); Irene Merker Rosenberg, *The Ten Commandments and the Lesser Included Offenses of Murder and Theft*, 39 CRIM. L. BULL. 693 (2003); Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT’L & COMP. L. REV. 257 (2006); Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does “Old Testament Justice” Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715 (2006); Elimelech Westreich, *Elements of Negotiability in Jewish Law in Medieval Christian Spain*, 11 THEORETICAL INQUIRIES L. 411 (2010); Steven H. Resnicoff, *Jewish and American Bankruptcy Law: Their Similarities, Differences, and Interactions*, 19 AM. BANKR. INST. L. REV. 551 (2011); J. David Bleich, *Support of Non-Biological Children in Jewish Law*, 3 INT’L J. JURIS. FAM. 61 (2012); Steven H. Resnicoff, *Family Planning and Government Regulation: Jewish Law Perspectives*, 15 DEPAUL J. OF HEALTH CARE L. 15 (2013); Charlotte Elisheva Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, 90 CHICAGO-KENT L. REV. 63 (2015); Gertrude N. Levine & Samuel J. Levine, *Internet Ethics, American Law, and Jewish Law: A Comparative Overview*, 21 J. OF TECH. L.

In this section, I gave a brief example of substantive scholarship that can grow out of bibliographic scholarship. The analysis moved beyond a bibliographic exploration of a body of literature, and into the substance of the author's arguments. I began to describe parallel themes found in the early twentieth century legal critiques of Jewish law scholarship to late twentieth and early twenty-first century critiques of Jewish law scholarship as a means to illustrate how bibliographic scholarship can provide the foundation for substantive scholarship.

## V. CONCLUSION

Librarians play many roles in today's academic environment, and unfortunately, the role of a traditional bibliographer is often eclipsed by the day-to-day work of ordering materials and helping researchers. However, large-scale bibliographies, which I call bibliographic scholarship, provide a fertile seedbed for advancing traditional substantive scholarship. Features and trends in a body of scholarship can be uncovered by the bibliographer. In this paper I trace how this process unfolds. In my bibliography *Legal Scholarship in Jewish Law*, I noted that early twentieth century articles about Jewish law seemed to be consistently defensive, as if they were arguing against several negative and prevailing notions about Jewish law. A closer look at these article reveals that perhaps the defensiveness in these articles might be unnecessarily overheated. Finally, I provided a brief introduction of the type of substantive scholarship that might result from the information uncovered from the bibliographic scholarship.

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& Pol. 37 (2006); Avishalom Westreich, *Accommodating Religious Law with a Civil Legal System: Lessons From The Jewish Law Experience In Financial Family Matters*, 33 J.L. & REL. 481 (2018).